(5)

Supreme Court, U.S.
FILED
AUG 30 1996
CLERK

No. 95-1595

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BRUCE BABBITT, Secretary of the Interior, *et al.*,

Petitioners,

v.

MARVIN K. YOUPEE, SR., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF RESPONDENTS AND AFFIRMANCE OF THE DECISION BELOW

Of Counsel
STEPHEN E. ABRAHAM
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

* JAMES. S. BURLING
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae

BEST AVAILABLE COPY

36 pp

QUESTION PRESENTED

Whether the Ninth Circuit correctly held that Section 207 of the Indian Land Consolidation Act, as amended, 25 U.S.C. § 2206, violated the Fifth Amendment because it did not provide for compensation to the estate of the decedent for the land it declared to escheat.

PARTIES TO THE PROCEEDINGS BELOW

In the courts below, the defendant/appellant was the Secretary of the Interior. The plaintiffs/appellees were Marvin K. Youpee, Sr., Cary G. Youpee, Darlan D. Youpee, Allen F. Youpee, Helen Youpee-Ricker, and Williamette Y. Bussard.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS BELOW i

TABLE OF AUTHORITIES CITED iv

INTEREST OF AMICUS CURIAE 1

OPINION BELOW 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 7

ARGUMENT 9

SECTION 207 OF THE INDIAN LAND CONSOLIDATION ACT, AS AMENDED, RESULTS IN A TAKING OF PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT 9

A. The Basis for Section 207, as Amended, Denies Protection of Fundamental Constitutional Rights While Perpetuating Anachronistic Notions of Native American Property Ownership 9

1. There is No Evidence That Congress Intended For The Original Acts to Reserve Or Otherwise Convey Any Property Interest Less Than An Absolute Undivided Interest in Fee Simple 9

2. There is No Justification For the Introduction of a Subjective Element Into The Takings Clause, Particularly Where Such An Element Is Defined By Race or Culture 11

B. Section 207 Is Unconstitutional, Even as Amended, Applying the Same Analysis Used by This Court in Hodel v. Irving 14

1. Applying the Penn Central Ad Hoc Analysis, This Court in Hodel Found Section 207 to be Unconstitutional 14

2. Applying the Penn Central Ad Hoc Analysis to This Case, Section 207 as Amended Is Still Unconstitutional 15

a. The Relative Economic Impact on Plaintiffs Is Substantial 16

b. Character of Government Action 17

(1) "Average Reciprocity of Advantage" Does Not Apply to a Transfer of Property That Should Be Exercised in Eminent Domain 19

(2) Section 207 Abrogates the Ability of Affected Property Owners to Pass Their Property to Their Children 23

C. Nothing in This Court's Decision in Hodel v. Irving Precludes the Promulgation of Rules Designed to Minimize or Eliminate Continued Fractionation of Allotment Interests Without Violating the Fifth Amendment 26

CONCLUSION 27

TABLE OF AUTHORITIES CITED

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 1

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) 13

Andrus v. Allard, 444 U.S. 51 (1979) 17-18

Dolan v. City of Tigard, 512 U.S. ___, 114 S. Ct. 2309 (1994) 1,21

Euclid v. Ambler, 272 U.S. 365 (1926) 22

Fletcher v. Peck, 10 U.S. 87 (1810) 10

Goldblatt v. Hempstead, 369 U.S. 590 (1962) 22

Hadacheck v. Sebastian, 239 U.S. 394 (1915) 22

Hodel v. Irving, 481 U.S. 704 (1987) . . . . . *passim*

Irving v. Clark, 758 F.2d 1260 (1985) 4

Jackman v. Rosenbaum Co., 260 U.S. 22 (1922) 19-20

Journeycake v. Cherokee Nation, 28 Ct. Cl. 281 (1893), *aff'd*, 155 U.S. 196, 207 (1894) 12

Kaiser Aetna v. United States, 444 U.S. 164 (1979) . 14

Page

Keystone Bituminous Coal Association v.
DeBenedictis, 480 U.S. 470 (1987) 21-23

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 21-23

Miller v. Schoene, 276 U.S. 272 (1928) 22

Nollan v. California Coastal Commission,
483 U.S. 825 (1987) 1

Penn Central Transportation Co. v.
New York City, 438 U.S. 104 (1978) 14-15,21-22

Pennsylvania Coal Co. v. Mahon,
260 U.S. 393 (1922) 7-8,20

Plymouth Coal Co. v. Pennsylvania,
232 U.S. 531 (1914) 20

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984) 12

Solem v. Bartlett, 465 U.S. 463 (1984) 10

United States v. Fuller, 409 U.S. 488 (1973) 11

Webb's Fabulous Pharmacies, Inc. v.
Beckwith, 449 U.S. 155 (1980) 12

West River Bridge Co. v. Dix,
47 U.S. 507 (1848) 9-10

Page

UNITED STATES CONSTITUTION

Amend. V (Just Compensation Clause) . . . . . *passim*

UNITED STATES STATUTES

Act of March 2, 1889, ch. 405, 25 Stat. 888 . 2,8-9,11,26

General Allotment Act of 1887,
ch. 119, 24 Stat. 388 2,8-9,11,26

Indian Land Consolidation Act of 1983 (ILCA),
25 U.S.C. § 2201, et seq. 3,25

§ 207, 25 U.S.C. 2206, 96 Stat. 2519 . . . . . *passim*

MISCELLANEOUS

78 Cong. Rec. 11,728 (1934) 3

Black's Law Dictionary (6th ed. 1990) 11

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. PLF has over 20,000 supporters nationwide. Policy for PLF is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board of Trustees evaluates the merits of any contemplated legal action and authorizes such legal action only when the Foundation's position has broad support within the general community. PLF's Board of Trustees has authorized the filing of a brief *amicus curiae* in this matter.

PLF has participated in numerous cases involving constitutional protection of property rights before this Court and other courts representing both *amicus curiae* and property owners. Particularly noteworthy of PLF's involvement in land use and the Takings Clause cases, Foundation attorneys represented the Nollans in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and the Foundation itself participated as *amicus curiae* in cases from *Agins v. City of Tiburon*, 447 U.S. 255 (1980), to *Dolan v. City of Tigard*, 512 U.S. ___, 114 S. Ct. 2309 (1994), including the closely related case of *Hodel v. Irving*, 481 U.S. 704 (1987).

PLF seeks to augment the argument in support of the respondents and affirmance of the decision of the Court of Appeals for the Ninth Circuit. PLF believes that its public policy perspective and litigation experience in support of economic rights will provide an additional needed viewpoint with respect to the issues presented by this case.

Because of the extraordinary importance of the issues raised by this case for private property owners nationwide, Pacific Legal Foundation provides this amicus curiae brief in support of the respondents. Consent to the filing of this brief

has been granted by counsel for petitioners and respondents, and has been lodged with the Clerk of this Court.

OPINION BELOW

The September 5, 1995, opinion of the United States Court of Appeals for the Ninth Circuit is reported at 67 F.3d 194 (9th Cir. 1995). The March 3, 1994, opinion of the United States District Court for the District of Montana, Billings Division is reported at 857 F. Supp. 760 (D. Mont. 1994).

STATEMENT OF THE CASE

The Fifth Amendment to the United States Constitution provides in relevant part that "no person shall ... be deprived of property, without due process of law; nor shall private property be taken for public use, without just compensation."

In 1887, Congress enacted the General Allotment Act, ch. 119, 24 Stat. 388, as a means of dividing the communal reservations of Indian tribes into individual allotments for Indians and unallotted lands for non-Indian settlement. Two years later, Congress adopted a statute[1] which divided the Great Reservation of the Sioux Nation into separate reservations and allotted specific tracts of reservation land to individual Indians. Each head of household took 320 acres of land and most other individuals 160 acres. The allotments were held in trust and, until 1910, the land passed according to the laws of inheritance in the states where the lands were located. After 1910, the allotments could be disposed of, subject only to regulations promulgated by the Secretary of the Interior.

Because the land was held in trust and could not be alienated or partitioned, undivided interests in the allotments

---

[1] Act of March 2, 1889, ch. 405, 25 Stat. 888.

were passed to successive generations. In each generation the number of property owners increased geometrically until, after less than 100 years, some parcels had hundreds of owners.

Hearings before Congress led to the realization that the administrative costs in many cases exceeded the income generated by leases of the parcels. 78 Cong. Rec. 11,728 (1934). Despite Congress having ended the practice of creating allotments in 1934, the fractionalization of parcels continued. Finally, Congress passed the Indian Land Consolidation Act of 1983 (ILCA), 25 U.S.C. § 2201, *et seq.*, in an effort to ameliorate the problem.

Section 207 of the Indian Land Consolidation Act, 25 U.S.C. § 2206, provided:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subjected to a tribe's jurisdiction shall descend by intestacy or devise but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat.

96 Stat. 2519.

Because Congress made no provision for the payment of compensation to the owners of the interests covered by Section 207, this Court determined that section of the Indian Land Consolidated Act unconstitutional as authorizing a taking of property without just compensation in violation of the Fifth Amendment. *Hodel v. Irving*, 481 U.S. 704.

While recognizing that the states have "broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause," this Court unequivocally deemed the

right to pass on property to one's heirs itself to be a valuable right. *Hodel*, 481 U.S. at 715, 717. The difference between the ability of a state to limit or even eliminate a method of testamentary devise and this section was that *both* descent and devise were completely abolished. *Hodel*, 481 U.S. at 718.[2]

---

[2] Prior to this Court's decision in *Hodel* as well as the decision of the Court of Appeals for the Eighth Circuit, *Irving v. Clark*, 758 F.2d 1260 (1985), Section 207 was amended. That amended version of the section was not properly before this Court and no opinion on the validity of the amended section was expressed. *Hodel*, 481 U.S. at 710 n.1. That amended section is now properly before this Court and provides, in part:

> (a) Descent or distribution
>
> No undivided interest held by a member or nonmember Indian in any tract of trust land or restricted land within a tribe's reservation or outside of a reservation and subject to such tribe's jurisdiction shall descend by intestacy or devise but shall escheat to the reservation's recognized tribal government, or if outside of a reservation, to the recognized tribal government possessing jurisdiction over the land if such interest represents 2 per centum or less of the total acreage in such tract and is incapable of earning $100 in any one of the five years from the date of decedent's death. Where the fractional interest has earned to its owner less than $100 in any one of the five years before the decedent's death, there shall be a rebuttable presumption that such interest is

(continued...)

William Youpee, a member of the Sioux and Assiniboine Tribes, died on October 19, 1990, at the age of 75. During his lifetime, he possessed undivided interests in allotted trust land on several Indian reservations. Upon his death, Youpee's estate was assigned to an Administrative Law Judge (ALJ) of the Department of the Interior (DOI) to determine the heirs to and claims against the estate. At the hearing, the ALJ stated that a number of Youpee's interests would escheat to various tribes under the amended ILCA.

---

[2] (...continued)

> incapable of earning $100 in any one of the five years following the death of the decedent.
>
> (b) Escheatable fractional interest
>
> Nothing in this section shall prohibit the devise of such an escheatable fractional interest to any other owner of an undivided fractional interest in such parcel or tract of trust or restricted land.
>
> (c) Adoption of Indian tribal code
>
> Notwithstanding the provisions of subsection (a) of this section, any Indian tribe may, subject to the approval of the Secretary, adopt its own code of laws to govern the disposition of interests that are escheatable under this section, and such codes or laws shall take precedence over the escheat provisions of subsection (a) of this section, provided, the Secretary shall not approve any code or law that fails to accomplish the purpose of preventing further descent or fractionation of such escheatable interests.

ILCA § 207, 25 U.S.C. § 2206.

They would escheat to the tribes based on Bureau of Indian Affairs (BIA) certifications that Youpee's interest in specific allotments were 2% or less, and that the designated devisee was not an owner of an existing share of that allotment.

After a rehearing was denied, plaintiffs, heirs of Youpee to whom interests in the allotted trust land would have passed but for the escheat provisions of the ILCA, appealed to the DOI Board of Indian Appeals. The board dismissed the appeal for want of jurisdiction after which an action was filed in United States District Court.

The District Court granted summary judgment in favor of the plaintiffs. It held, just as this Court had in *Hodel v. Irving*, that plaintiffs had standing to assert their claims and declared that Section 207 of the ILCA, as amended, violated the Takings Clause of the Fifth Amendment. *Youpee v. Babbitt*, 857 F. Supp. 760, 766 (D. Mont. 1994).

The government timely appealed to the Court of Appeals for the Ninth Circuit which affirmed the decision of the District Court. In its opinion, the court observed:

> Instead of allowing the decedent to choose one devisee from the population, the amended statute restricts the population to a very limited group, which is unlikely to contain any lineal descendants, and requires the decedent to choose a devisee from this group. The amended ILCA continues to completely abrogate both the descent and devise of land to an heir by owners such as Mr. Youpee who do not have an heir who possesses an undivided interest. Thus, under ILCA, many decedents will be unable to transfer land to their heirs, which Hodel recognizes is "itself a valuable right."

> The amended ILCA restricts descent and devise of land by Indian landowners who do not have an heir who owns a share in the parcel. The amended statute continues to completely abolish one of the sticks in the bundle of rights for a class of Indian landowners.

Youpee v. Babbitt, 67 F.3d 194, 199-200 (9th Cir. 1995).

In *Hodel*, this Court held that the regulation was extraordinary, amounting "to virtually the abrogation of the right to pass on a certain type of property--the small undivided interest--to one's heirs." *Hodel*, 481 U.S. at 716.

The question raised in this case is whether Section 207 of the ILCA, as amended, which still severely limits the number of individuals to whom property may be transferred, and, for all practical purposes, eliminates both descent and devise to lineal heirs, destroys an essential valuable property right. The issue at the core of this case is whether small parcels of property are no less deserving than large parcels of the protections afforded by the Fifth Amendment to the United States Constitution.

For the reasons stated below, amicus Pacific Legal Foundation supports respondents' request that this Court affirm the decision of the United States Court of Appeals for the Ninth Circuit on September 5, 1995, wherein that court ruled Section 207 to be in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

In 1987, this Court held Section 207 to be unconstitutional, depriving the property owners of an essential element of property ownership, one "part of the Anglo-American legal system since feudal times." *Hodel v. Irving*, 481 U.S. at 716. In the words of Justice Holmes, the regulation "[went] too far." *Id.* at 718 (citing *Pennsylvania*

Coal Co. v. Mahon, 260 U.S. 393, 415 (1922)). By the time the case was heard, the section had been amended, but that amendment was not properly before this Court. This case presents those amendments which are as constitutionally infirm as the original.

Section 207 of the ILCA, as amended, prohibits a transfer by devise or descent of undivided interests in allotments in real property if they constitute less than 2% of the total acreage or are incapable of earning $100 in any one of the five years preceding the death of the property owner unless the proposed recipient is already an owner of an undivided interest in that same property. If these conditions are not met, the property escheats to the tribe. The Interior Secretary asserts this provision is necessary to avert the ills resulting from highly fractionated interests in Indian lands. The terms of this section are justified, according to petitioner's brief, because Indians do not have a view of individual property ownership akin to that of non-Indians (Pet. Brief at Footnote 13) and, furthermore, because "the sovereign has substantial authority to regulate the laws of inheritance." Pet. Brief at 34.

The first basis for regarding this section as constitutional is both repugnant as an anachronistic, ethnocentric caricature of Indians and contrary to the provisions of the original Acts of 1887 and 1889 which were intended to divide the tribal property holdings into *individual* allotments. The second basis is equally untenable, petitioner having not demonstrated any support for the proposition that interests in property can be abrogated where no reservation is made at the time of their creation without running afoul of the Fifth Amendment.

Applying the same analysis used by this Court in *Hodel v. Irving* to what is the same regulatory scheme in all of its essential aspects, there can be no other conclusion than that Section 207 continues to violate the Fifth Amendment by

depriving property owners of an essential attribute of property ownership.

ARGUMENT

SECTION 207 OF THE INDIAN LAND CONSOLIDATION ACT, AS AMENDED, RESULTS IN A TAKING OF PROPERTY WITHOUT JUST COMPENSATION IN VIOLATION OF THE FIFTH AMENDMENT

A. The Basis for Section 207, as Amended, Denies Protection of Fundamental Constitutional Rights While Perpetuating Anachronistic Notions of Native American Property Ownership

1. There is No Evidence That Congress Intended For The Original Acts to Reserve Or Otherwise Convey Any Property Interest Less Than An Absolute Undivided Interest in Fee Simple

The Acts of 1887 and 1889 were clearly *intended* to divide communal reservations of Indian tribes into *individual* allotments. *Hodel*, 481 U.S. at 706.

Nearly 150 years ago, in *West River Bridge Co. v. Dix*, 47 U.S. 507 (1848), this Court characterized a contract regarding property in terms at odds with that proposed by the petitioner.

> Under every established government, the tenure of property is derived mediately or immediately from the sovereign power of the political body .... It can rest on no other foundation, can have no other guarantee. ... Upon any other hypothesis, the law of property would be simply the law of force. Now it is undeniable, that the investment of property in the citizen by the government, whether made for a pecuniary consideration or

> founded on conditions of civil or political duty, is a contract between the State ... and the grantee; and both the parties thereto are bound in good faith to fulfil it.

Id. at 532.

The two Acts which precipitated the division of tribal lands into the hands of individual landowners were "in part animated by a desire to force Indians to abandon their nomadic ways in order to 'speed the Indians' assimilation into American society.'" *Hodel*, 481 U.S. at 706 (quoting *Solem v. Bartlett*, 465 U.S. 463, 466 (1984)). By these acts, Congress granted to Native Americans, individually, an undivided interest in the land once held by their tribes. Having thusly vested them with a legal estate, Congress cannot now undo this grant without complying with the compensation requirement of the Fifth Amendment's Takings Clause. As this Court observed more than 175 years ago:

> But, if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estate, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

Fletcher v. Peck, 10 U.S. 87, 135 (1810).

Nor is there any authority for the proposition that the Secretary has the authority to promulgate regulations which terminate the interests of individual property owners where no such power to revoke or impair the interests was reserved by Congress when the land was originally granted to the Indians. *See United States v. Fuller*, 409 U.S. 488, 492 (1973) (no compensation due under Fifth Amendment where permits were revocable).

Notwithstanding suggestions to the contrary, the Acts of 1887 and 1889 granted absolutely to Native Americans an unreserved personal interest in property that the Secretary cannot now deny. Petitioner provides no support, nor can there be any justification, for the proposition that Indian property owners are less deserving of protection under the Fifth Amendment to the United States Constitution.

2. There is No Justification For the Introduction of a Subjective Element Into The Takings Clause, Particularly Where Such An Element Is Defined By Race or Culture

Black's Law Dictionary defines *escheat* as "[a] reversion of property to the state in consequence of a want of any individual competent to inherit." BLACK'S LAW DICTIONARY 545 (6th ed. 1990).[3]

The United States would promote a redefinition of *escheat* to include an instance where there was no "one in existence *suitable to Congress* and able to make claim thereto." This application is apparently justified because of the anachronistic notion that individual property ownership is alien to Native Americans.

To argue that such conduct is permissible because the subjects of this regulatory scheme are Indians whose notions of private property ownership are different from ours is repugnant to say the least and, furthermore, would inject into the Takings Clause a subjective element--the property owner's personal economic theory on private property ownership--heretofore conspicuously absent.

The United States argues, however, that

---

[3] It further notes that "the word, in this country, merely indicates the preferable right of the state to an estate left vacant, and without there being any one in existence able to make claim thereto." *Id.*

> it has long been recognized that "Indian lands were communal property" and that "every member of the community is an owner of it as such"--a type of organization of property that is "a thing unknown" elsewhere in this country.

Pet. Brief at 29 n.13 (citing *Journeycake v. Cherokee Nation*, 28 Ct. Cl. 281, 302-03 (1893), *aff'd*, 155 U.S. 196, 207 (1894)). To compound this generalization, petitioner continues:

> That background supports the assumption that individuals with such small interests would not have objected to leaving them to escheat to the Tribe, for the benefit of the community as a whole.

Pet. Brief at 29 n.13.

As this Court has observed on more than one occasion,

> the basic axiom [is] that "[p]roperty interests ... are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law."

Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1001 (1984), (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980)).

No opinion of this Court comes to mind where the subjective definition of "private property ownership" has

determined whether or not state property laws will be applied or Fifth Amendment protections afforded.[4]

The attempt by the Secretary to infuse a subjective term relating to "theories of private property" into the Fifth Amendment is all the more repugnant because it does not rely upon objective criteria but race and cultural history. Presumably, the uncompensated taking of property would be permissible so long as the state can find an instance in history where property was held communally rather than individually.[5]

This Court should eschew the specious and unsupported arguments of those who would suggest that Congress could not have intended to confer upon the Indians individual title because of the Indian's *unique notion* of property ownership.

---

[4] A rule to the contrary could well "vest judges with broad subjective discretion to protect property interests that happen to appeal to them." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 261 (1978) (Brennan, J, dissenting).

[5] Amicus doubts whether *any* person could ever have a Takings claim were such a subjective element the law. The only challenge to the state would be one of how far back in history to go, whether Native American practices of the Eighteenth Century or European practices of the Middle Ages.

B. Section 207 Is Unconstitutional, Even as Amended, Applying the Same Analysis Used by This Court in Hodel v. Irving

1. Applying the Penn Central Ad Hoc Analysis, This Court in Hodel Found Section 207 to be Unconstitutional

In *Hodel v. Irving*, this Court determined Section 207 to be unconstitutional. Relying upon the *ad hoc* approach set forth in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978), and *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979), this Court considered such factors

> "as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action."

Hodel, 481 U.S. at 714. As the inquiry was applied to *Hodel*, this Court found there to be "no question that the *relative* economic impact of Section 207 upon the owners of these property rights could be substantial." *Id.* (emphasis added).[6]

This Court acknowledged that the "extent to which any of the appellees' decedents had 'investment-backed

---

[6] This Court pointed out that the value of the property escheated to the tribe was approximately $2,700 and $1,816, neither of which were viewed as trivial sums. *Hodel*, 481 U.S. at 714. This Court evidently did not find it necessary to compare these sums to the expenses borne in managing the property. The relevant factor was intrinsic value, not income producing potential. Nevertheless, the petitioner Secretary of Interior in this case would attempt to make this very argument. *See, e.g.*, Pet. Brief at Footnote 7 and accompanying text.

expectations' in passing on the property [was] dubious." *Id.* at 715.

However, this Court demonstrated that while courts would engage in *ad hoc* evaluations based on the three factors, these factors were certainly not equal in each case. Observing that its analysis to a point had led to the belief that the section was not unconstitutional, Justice O'Connor, writing for this Court, observed under the facts of the case the third factor--character of the government action--tipped the scales in favor of finding a taking

> If we were to stop our analysis at this point, we might well find Sec. 207 constitutional. But the character of the Government regulation here is extraordinary. ... [T]he regulation here amounts to virtually the abrogation of the right to pass on a certain type of property–the small undivided interest–to one's heirs. In one form or another, the right to pass on property–to one's family in particular–has been part of the Anglo-American legal system since feudal times.

Hodel, 481 U.S. at 716. The section was unconstitutional notwithstanding the fact that the interests were alleged by the government to be *de minimis*. *Id.*

2. Applying the Penn Central Ad Hoc Analysis to This Case, Section 207 as Amended Is Still Unconstitutional

The evaluation of Section 207, as amended under the three criteria set forth in *Penn Central*, leads to the inescapable conclusion that the escheat provision of Section 207 violates the Takings Clause of the Fifth Amendment to the United States Constitution. Sharing many similarities with *Hodel*, the two most significant factors affecting the plaintiffs here are that the relative economic loss

is substantial and the character of the government action is so extraordinary as to compel the finding by this Court that Section 207 was and remains unconstitutional.

a. The Relative Economic Impact on Plaintiffs Is Substantial

In this case, the petitioner attempts to employ an income-based scheme for determining whether there is a significant economic impact. Pet. Brief at 24-25. The Secretary believes that by merely substituting in the section the term of "five years" in place of "one year," all constitutional infirmities will be swept aside. Pet. Brief at 25. This simply ignores the bulk of this Court's comments related to the subject of the value of the property. Past income was but one aspect, certainly not one of paramount importance, given this Court's considerable discussion of the *total* value of the property. This Court's opinion refers to the legislative history of the 1984 amendments to Section 207 which suggest that valuable property may escheat if the section does not look back more than one year. *Hodel*, 481 U.S. at 714. However, in the context of this Court's discussion of other aspects of the property's value, the substitution of the term of years should not have been presumed to be the solution to Section 207's constitutional infirmities. Were this so, this Court's comment that "much or most of the value of the parcel may inhere in [the *right* to pass the property on to one's heirs]" (*Hodel*, 481 U.S. at 715) would have been mere surplusage.

The value of the land in this case which escheats as a result of Section 207 is said to be $2,100. Respondent's Brief in Opposition to Petition at Footnote 3 (citing Environmental Record at 4).[7] However, the Secretary avoids any substantial discussion of the actual economic loss to the

[7] This Court viewed $1,816 as valuable. *Hodel*, 481 U.S. at 714.

Native American property owners as a result of the escheatment provision of Section 207 by focussing only on one aspect of the property's value–income.

Section 207 deprives Native Americans of relatively valuable interests in property. That some of these parcels may generate little income does not make them valueless and undeserving of Fifth Amendment protections, any more than suggesting that a personal residence has no value because it does not earn rental income. Furthermore, this Court has not previously placed a dollar minimum on the amount of property that will qualify for compensation once it has determined that a protectable property interest has been taken. The Secretary can offer no justification to this Court for creating such an exception to the Takings Clause.

b. Character of the Government Action

In *Hodel*, the extent to which Section 207 abrogated the right to pass on certain types of property to one's heirs was viewed as extraordinary. *Hodel*, 481 U.S. at 716. Perhaps as extraordinary as the section itself were the arguments presented by the government in support of the section. Curiously, in addition to a few new ones, petitioner restates many of the arguments unsuccessful in *Hodel*.

For instance, petitioner cites *Andrus v. Allard*, 444 U.S. 51 (1979), in support of the proposition that Section 207 is not unconstitutional but fails to mention the fact that *Andrus* related to the sale of Indian artifacts, in violation of the Eagle Protection Act and the Migratory Bird Treaty Act. Quite simply, the extension of *Andrus*, which related to avian artifacts, does not appear justified beyond its facts.

In *Andrus*, petitioners challenged the validity of regulations promulgated by the Secretary of Interior prohibiting commercial transaction in parts of birds legally killed before birds came under protection of Eagle Protection

Act and Migratory Bird Treaty Act. This Court held that the Acts did not violate the Fifth Amendment's Takings Clause.

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking.

Andrus, 444 U.S. at 65. "In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds." *Id.* at 66.

It seems difficult if not impossible to move beyond the obvious distinction that the Acts in *Andrus* created a category of personal property that could not be entered into the stream of commerce; this case involves the forfeiture of an interest in real property to the tribe. If an owner of the protected feathers did nothing, he would still retain an essential aspect of ownership, "the right to pass on [the] property to [his] family." *Hodel v. Irving*, 481 U.S. at 716. No semblance of that essential aspect of property ownership remains for plaintiffs here, whose property would escheat to the tribe upon their death unless they transferred it to an existing allotment owner.

Furthermore, as a justification for the extraordinary actions taken by the government, petitioner relies upon the notion of "average reciprocity of advantage," a theory with perhaps some merit in the context of its original application but which has been so stretched and overused, justifying every sort of taking, whether regulatory or physical, that it has become less a theory than a slogan.

(1) "Average Reciprocity of Advantage" Does Not Apply to a Transfer of Property That Should Be Exercised in Eminent Domain

Petitioner relies upon language in *Hodel* to the effect that Section 207's escheatment provision is justified by its provision of an "average reciprocity of advantage." Pet. Brief at 27 (citing *Hodel*, 481 U.S. at 715). Petitioner's reliance upon this notion of "average reciprocity of advantage" not only takes the quote out of context, stripping it of its intended meaning, but applies it to a case where the advantages are neither "average" nor "reciprocal."

In *Hodel*, this Court observed that "the owners of escheatable interests often benefit from the escheat of other's fractional interests." *Id.* at 715-16. However, the qualification overlooked or ignored by petitioner was that this aspect of Section 207 only "weigh[ed] weakly in favor of the statute." *Hodel*, 481 U.S. at 715. This advantage could only be realized "to the extent that owners of escheatable interests maintain a nexus to the Tribe." *Id.* Furthermore, this Court relied upon the assumption that "the whole benefit gained is greater than the sum of the burdens imposed since consolidated lands are more productive than fractionated lands." *Id.* at 716. However, assumptions alone cannot justify the constitutionally infirm escheatment provisions of Section 207. Petitioner relies on nothing more than the conclusory statement, "[t]he fact that the amended Act continues to offer benefits to those who also must bear its costs cuts in favor of its constitutionality." Pet. Brief at 27.

"Average reciprocity of advantage" was certainly not intended to apply to this type of case. In *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 30 (1922), this Court observed that particular exercises by the states of their police power, specifically the ability to place burdens upon property, have been justified because of an "average

reciprocity of advantage." However, in *Jackman*, the object of this treatment was a "party wall," a wall, built at the edge of the property line separating two adjoining properties, that was intended to support structures on both properties. The equivalence of the benefit to both properties by the wall is obvious.

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. at 415, the Supreme Court, in an opinion written by Justice Holmes, struck down the Kohler Act which precluded coal companies from mining under inhabited land. Justice Holmes distinguished the Court's earlier decision in *Plymouth Coal Co. v. Pennsylvania*, 232 U.S. 531 (1914), a case in which

> it was held competent for the legislature to require a pillar of coal to be left along the line of adjoining property, that with the pillar on the other side of the line would be a barrier sufficient for the safety of the employees of either mine in case the other should be abandoned and allowed to fill with water. But that was a requirement for the safety of employees invited into the mine, and secured an *average reciprocity of advantage* that has been recognized as a justification of various laws.

Pennsylvania Coal, 260 U.S. at 415 (emphasis added).[8]

---

[8] As the Court observed:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. ... When this seemingly absolute protection is found to be qualified by the police power, the

(continued...)

Once again, "average reciprocity" was limited to a conceptual if not literal party wall, one of coal and other subsurface strata. The Court's discussion regarding the expansion of police powers appear justified, given the attempt to justify a taking of property based on "average reciprocity." However, without legal authority for the application of a state's police powers, the notion of "average reciprocity" cannot suffice to justify an uncompensated taking of property.

Members of this Court have discussed this phrase in at least five cases in recent years, *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (Rehnquist, J. dissenting); *Hodel v. Irving*, 481 U.S. 704; *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); and, most recently, *Dolan v. City of Tigard*, 114 S. Ct. 2309. However, in none of these cases was the reference used as a justification for an uncompensated physical taking as is advocated here by petitioner.

In *Penn Central*, a regulatory takings case, Justice Rehnquist in his dissent observed that there was *no* reciprocity of advantage.

> Where a relatively few individual buildings, all separated from one another, are

---

[8] (...continued)

> natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

Id. (citations omitted).

> singled out and treated differently from surrounding buildings, no such reciprocity exists. The cost to the property owner which results from the imposition of restrictions applicable only to his property and not that of his neighbors may be substantial--in this case, several million dollars--with no comparable reciprocal benefits. And the cost associated with landmark legislation is likely to be of a completely different order of magnitude than that which results from the imposition of normal zoning restrictions.

Id. at 140.[9]

Even in *Keystone*, reference is made to this reciprocity only in terms of nuisance, an aspect of that case having no parallel here.

> The Court's hesitance to find a taking when the State merely restrains uses of property that are tantamount to public nuisances is consistent with the notion of "reciprocity of advantage" that Justice Holmes referred to in *Pennsylvania Coal*. Under our

---

[9] Nor does the majority in *Penn Central rely* upon this theory of "reciprocity of advantage." This Court's broad discussion of the advantages of the Landmarks Law to all New Yorkers appears little different from an analysis of benefits and burdens in other zoning cases, such as *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Euclid v. Ambler*, 272 U.S. 365, 388-89 (1926); *Miller v. Schoene*, 276 U.S. 272, 279-80 (1928); and *Goldblatt v. Hempstead*, 369 U.S. 590, 592-93 (1962). Each of those cases were cited as examples where zoning laws affected some property owners more severely than others. *Penn Central*, 438 U.S. at 133-34.

> system of government, one of the State's primary ways of preserving the public weal is restricting the uses individuals can make of their property.

Keystone, 480 U.S. at 491 (footnotes omitted).

In *Lucas*, another regulatory takings case, this Court observed an unwillingness to

> indulge our usual assumption that the legislature is simply "adjusting the benefits and burdens of economic life," in a manner that secures an "average reciprocity of advantage" to everyone concerned [when a property owner suffers the total deprivation of beneficial use of property.]

Lucas, 505 U.S. at 1017 (citations omitted). This Court warned of the risks that "private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id.*

At the core of petitioner's justification for taking plaintiffs' property is the phrase "average reciprocity of advantage" and nothing more. Pet. Brief at 27. There is no analysis demonstrating either advantage or reciprocity. Furthermore, there is no declaration of the compelling reasons that must exist in this case for not regulating the property but instead seizing it from the lawful owners. There is none because none can exist for what this Court warned is nothing less than the impressment of private property "under the guise of mitigating serious public harm." *Lucas*, 505 U.S. at 1017.

(2) Section 207 Abrogates the Ability of Affected Property Owners to Pass Their Property to Their Children

In *Hodel*, the abrogation of the right to pass on certain types of property to one's heirs was viewed as

extraordinary. *Hodel*, 481 U.S. at 716. This Court reached this conclusion notwithstanding the possibility that there were other devices which could be used to convey the property.

> The fact that it may be possible for the owners of these interests to effectively control disposition upon death through complex inter vivos transactions such as revocable trusts is simply not an adequate substitute for the rights taken, given the nature of the property.

Id. Petitioner seeks to make that very same argument in this case, asserting that the interest in being able to transfer the property, by gift or sale, should be superior to that of being able to pass the property to the property owner's children. Pet. Brief at 27-31.

Petitioner attempts to assure this Court that, unlike the Section 207 provisions before this Court in *Hodel*, this Act "no longer entirely prohibits devise of minor fractional interests." Pet. Brief at 31. Petitioner continues:

> The amended Act provides that "[n]othing in this section shall prohibit the devise of * * * an escheatable fractional interest to any other owner of an undivided fractional interest in [the] parcel." 25 U.S.C. 2206(b). It therefore remedies the defect identified by the Court in *Hodel v. Irving* by permitting devise of property if the devisee already owns an interest in the same parcel.

Pet. Brief at 32.

In fact, petitioner's promise of a remedy rings hollow. Despite the assertion that the defects identified in *Hodel* have been cured, the contrary is assuredly true. As the District Court observed:

> The amended escheat provision corrects the defect of abolishing devises which would result in consolidation. However, for those property owners who are not legally capable of devising property, or for those like William Youpee, who do not have an heir who possesses an undivided interest in the escheatable property, the statute, as amended, continues to allow the total abolition of both descent and devise of such property.

Youpee v. Babbitt, 875 F. Supp. at 765.

Agreeing, the Court of Appeals for the Ninth Circuit stated:

> The amended statute approaches the problem from the opposite end of the Court's proposed solution. Instead of allowing the decedent to choose one devisee from the population, the amended statute restricts the population to a very limited group, which is unlikely to contain any lineal descendants, and requires the decedent to choose a devisee from this group. The amended ILCA continues to completely abrogate both the descent and devise of land to any heir by owners such as Mr. Youpee who do not have an heir who possesses an undivided interest.

Youpee v. Babbitt, 67 F.3d at 199-200.

For property owners such as Mr. Youpee, the ILCA as amended promises little but takes all. Despite the Secretary's assurances, few if any lineal descendants stand to qualify under Section 207. If left in its present state, the ILCA will "designate by statute a particular heir" (Pet. Brief at 29 n.13), a practice predicated on the government's assumption of how Indians view property ownership. According to the Secretary, the fact that one is of Indian ancestry is sufficient to prove one's political and economic

views.[10] It would not be unrealistic to venture that in a few generations, all of the individually owned property will have escheated to the tribe, undoing the Acts of 1887 and 1889.

C. Nothing in This Court's Decision in Hodel v. Irving Precludes the Promulgation of Rules Designed to Minimize or Eliminate Continued Fractionation of Allotment Interests Without Violating the Fifth Amendment

In *Hodel*, this Court concluded:

> It may well be appropriate for the United States to ameliorate fractionation by means of regulating the descent and devise of Indian lands. Surely it is permissible for the United States to prevent the owners of such interests from further subdividing them among future heirs on pain of escheat. ... It may be appropriate to minimize further compounding of the problem by abolishing the descent of such interests by rules of intestacy, thereby forcing the owners to formally designate an heir to prevent escheat to the Tribe. What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests even when the passing of the property to the heir might result in consolidation of property.

Hodel, 481 U.S. at 718.

Amicus submits, as was suggested by Justice Stevens in his concurring opinion in *Hodel*, that, in addition to these

---

[10] Footnote 13 to petitioner's brief concludes, "individuals with such small interests would not have objected to leaving them to escheat to the Tribe, for the benefit of the community as a whole."

methods of reducing or eliminating fractionation, the United States could purchase the property, either directly from the owners or by means of a condemnation action. *Hodel*, 481 U.S. at 719, (Stevens, J. concurring).

No matter how worthy the goal of eliminating extremely fractionated interests might be, no public purpose can justify running headlong through the protections of the United States Constitution, depriving plaintiffs of their property without just compensation. Elimination by statute of important property interests is not a permissible alternative to an action in eminent domain with its attendant protection of just compensation.

CONCLUSION

The extraordinary importance of this case cannot be overstated. Asserting the constitutionality of the escheatment provision of Section 207, the Secretary of the Interior has relegated Indian property rights to a category undeserving of Fifth Amendment protections. The Secretary justifies this forfeiture of private property on the basis of three theories. Firstly, the Secretary creates a subjective element within the Takings Clause--the notion that only those property owners who historically had a coherent belief in private property ownership are entitled to its protections. Secondly, the Secretary relies upon "mutual reciprocity of advantage," an overused phrase divorced from its original meaning. Thirdly, the Secretary would ascribe a dollar value below which, no matter what the nature of the property rights implicated, the Fifth Amendment would not apply. This Court cannot permit such a result.

The Takings Clause of the Fifth Amendment has never been held to apply only to those who have a particular internalized definition of private property. Furthermore, this Court has never before permitted such a compelled transfer of property as results from the application of Section 207 as amended with no more justification than a vague assertion

that the property owner receives a portion of a collective benefit of community ownership. Nor has there been an economic threshold below which the Fifth Amendment does not apply, notwithstanding the significance of the interest implicated by the confiscatory governmental action.

This Court has the opportunity to reaffirm that the Takings Clause is not a poor cousin to all of the other protections guaranteed under the Constitution of the United States. This Court should affirm the decision of the Court of Appeals which struck down Section 207 as unconstitutional.

DATED: September, 1996.

Respectfully submitted,

Of Counsel
STEPHEN E. ABRAHAM
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

* JAMES. S. BURLING
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888

Attorneys for Amicus Curiae